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No. 84-402

In the Supreme Court of the United States

OCTOBER TERM, 1984

EMANUEL BARSHOV AND
JAMES E. ROSS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners, defendants in a criminal tax shelter case, contend that they were denied a fair trial when the prosecutor in closing argument referred to a civil tax regulation that applied to petitioners' partnerships during the relevant period. The decision below is correct. Petitioners do not allege (nor is there) a conflict among the circuits or with any decision of this Court. There is no basis for further review.

1. After a jury trial in the United States District Court for the Southern District of Florida, petition-

ers Barshov and Ross were convicted of conspiracy to defraud the United States by impeding and impairing the Internal Revenue Service, in violation of 18 U.S.C. 371. In addition, Barshov was convicted on four counts and Ross on six counts of making and subscribing false tax returns, in violation of 26 U.S.C. 7206(1); and Barshov was convicted on 15 counts and Ross on 13 counts of assisting in the preparation and presentation of fraudulent tax returns, in violation of 26 U.S.C. 7206(2). Barshov and Ross were fined $10,000 and $2,500, respectively. Each was placed on three years' probation, conditioned on his performance of a number of hours of uncompensated community service specified by the district court (R. 821-824).

The evidence at trial showed that petitioners were successful promoters of tax shelter limited partnerships, which included nine real estate tax shelters and six motion picture tax shelters (Tr. 395-414, 454-458, 472, 641, 695-696). Petitioners' activities in connection with two of their movie shelters, PAN Properties, Ltd. (PAN), and NAP Properties, Ltd. (NAP), gave rise to the indictment in this case.

In preparing for the syndication of the movie shelters, Barshov and his attorney, Murray, sought the advice of an expert named Schwartzman (Tr. 93-96). Schwartzman explained that nonrecourse financing was a fairly standard method of acquiring movies (Tr. 97, 114). He explained that, for purposes of depreciation, the tax "basis" of a film was generally the amount of cash paid plus the amount of any note given to the seller (Tr. 96). In no event, however, could the basis exceed the fair market value of the collateral, that is, the value of the film itself (*ibid.*). Schwartzman further explained that the accepted

method of depreciating films was the "income forecast method." Under that method, the depreciation deduction for a given year is computed by multiplying the film's basis by a fraction, the numerator of which is the film's income for that year, and the denominator of which is the film's income for that year plus the film's reasonably estimated future income (Tr. 101-102). If a film produced no income in a given year, the numerator of the fraction would be zero, and there would be no depreciation deduction for that year (Tr. 103).

Schwartzman also explained that film properties at that time qualified for an investment tax credit of 7% (Tr. 98). The credit was computed, in situations where the film had a useful life of at least five but less than seven years, by applying the 7% figure to an amount equal to two-thirds of the film's basis (Tr. 99). Relying on information furnished by Schwartzman and others, Murray wrote tax opinion letters for PAN and NAP indicating that the partnerships' films would qualify for the investment tax credit and that, for investment credit purposes, a film would be deemed to have a useful life of at least five years if accumulated depreciation at the end of three years did not exceed 94% of the film's basis (Tr. 689, 694; GX 47, 48; DX 5A, 12). This 94% "safe harbor" figure was derived from a proposed Treasury Regulation. See Prop. Reg. § 1.46-3(e)(7)(iv)(*b*) (1976), withdrawn, 42 Fed. Reg. 37829 (1977).

Barshov approached a movie distributor named Lang for assistance in locating and acquiring films for PAN (Tr. 236). Barshov told Lang that he wished to spend over $2 million on films for the partnership and that he wanted to pay 10% in cash and 90% in nonrecourse notes (Tr. 238, 265). Lang thereupon

purchased four films from another party for $375,000; the consideration Lang gave consisted of $175,000 in cash and a $200,000 nonrecourse note (Tr. 239-240, 311-313). Lang then sold the same four films to PAN for $2.89 million, receiving in return $290,000 in cash and $2.6 million in nonrecourse notes (Tr. 240, 269; GX 49). The notes were payable out of the films' net distribution revenues (*ibid.*).[1]

PAN considered that it had "paid" $2.89 million for the four films and used that figure as its tax basis for calculating investment credits and depreciation deductions (GX 2, 3, 5, 6, 49). The films generated substantial investment tax credits for the partnership's investors in 1973 (GX 9, 12, 29, 32, 35). For 1974 and 1975, PAN's partnership returns reported depreciation in the amounts of $1,072,808 and $66,533 respectively (GX 2, 3), amounts that were reflected in deductions by petitioners and the limited partners on their individual tax returns for those years. At the end of 1975, the third year of the films' useful lives, the films showed accumulated de-

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[1] Lang also helped acquire films for NAP, functioning in that respect in an agency capacity (Tr. 242). Lang arranged NAP's purchase of three films for $1.19 million, of which $1.05 million was evidenced by nonrecourse notes (Tr. 242-243, 314; GX 50). The seller's agent testified that there were no price negotiations over these films; Lang merely offered a price and the seller's agent accepted (Tr. 314-315). Lang received $98,000 in commissions out of the cash that NAP paid for these three films (Tr. 243-244, 314). NAP purchased a fourth film for $1.35 million, of which $1.2 million was evidenced by nonrecourse notes (Tr. 242). Lang had previously negotiated to purchase that film himself for $450,000 (Tr. 242), and had told petitioners a few days before NAP purchased it that he could have bought it for $150,000 (Tr. 307-308; DX 35).

preciation deductions equal to 93.99% of their asserted tax bases (Tr. 128; GX 59A). Despite the sizeable tax benefits that the films generated, their actual earnings were poor. For example, for the three-year period ending in December 1975, one of the films grossed only $1,883 and another only $538 (GX 55).

In order to compute their depreciation deductions under the income forecast method, petitioners supplied income projection figures to the films' distributor, who prepared income forecasts at petitioners' request (Tr. 176-177, 182, 191). These forecasts determined the denominator of the income forecast fraction (Tr. 102). The distributor also prepared producer's reports, detailing the play dates and the annual gross income for each film (GX 55). These reports determined the numerator of the income forecast fraction (Tr. 102). The distributor submitted the income forecast letters and producer's reports to petitioners, and petitioner Ross in return submitted them to PAN's accountants (Tr. 131, 133; GX 59).

In 1975, one of PAN's films and one of NAP's films had no play dates and generated no income (Tr. 144, 178-179). At petitioner Ross' direction, one of petitioners' employees called the distributor to tell him that "he better find some income" for the two films (Tr. 145). The distributor testified that either Barshov or Ross also called him and asked him to revise the reports for the two films to show "a small amount of activity" (Tr. 180). The distributor obliged by submitting revised reports showing fictitious play dates and gross income of $173.18 for one film and $124.13 for the other (Tr. 180; GX 55, 56).

2. Petitioners were indicted on one count of conspiracy and on multiple counts of substantive violations of the tax laws (Pet. App. 8). The government contended that petitioners had knowingly assigned inflated values to the films and thus fraudulently increased the films' tax bases for depreciation and investment credit purposes. In addition, the government contended that petitioners had fraudulently manipulated the income forecast method of depreciation by falsifying the films' actual and projected revenue (*id.* at 10).

At trial, the prosecutor in his summation noted that petitioners had been advised not to depreciate the films by more than 94% of basis during the first three years lest they jeopardize their investment tax credits (Tr. 778-779). This advice, as noted above, was grounded on a "safe harbor" provision in a proposed Treasury Regulation. See page 3, *supra*. The prosecutor further noted that petitioners had in fact depreciated PAN's films up to 93.99% of basis during the first three years, and that the amount of depreciation thus taken was largely in petitioners' discretion, since the denominator of the income forecast fraction was "purely subjective" and a mere "guess" that petitioner Ross had made (Tr. 779-780). Drawing upon these facts, the prosecutor argued that the consistent pattern of 93.99% accumulated depreciation was "too extraordinary a coincidence" to be mere happenstance (Tr. 788, 791). Rather, the prosecutor argued, this pattern showed that petitioners had fraudulently manipulated the income forecast method to maximize depreciation deductions yet maintain the desired level of investment credit, and had thus "used the law to their advantage to defraud the [g]overnment" (Tr. 774).

On appeal of their convictions, petitioners contended that they had been denied a fair trial by various instances of prosecutorial misconduct (Pet. App. 13). One such alleged instance involved the prosecutor's reference to the 94% depreciation limitation discussed above. Petitioners contended that "any reference to civil regulations relating to depreciation was improper in drawing inferences of criminal conduct" (*ibid.*). The court of appeals rejected this contention, noting that the government had not "attempted to prove a crime simply by proving a violation of civil law or regulations" (*id.* at 14) and that there was ample evidence of fraud to sustain the jury's verdict of guilty (*id.* at 11-12, 14).[2]

3. Petitioners reiterate their contention (Pet. 7-9) that the prosecutor's reference to the 94% limitation denied them a fair trial. They argue that this "safe harbor" provision was designed to require consistent depreciation, that the proposed regulation "required [them] * * * to depreciate the films in the very manner" that they did (Pet. 7), and that the prosecutor misled the jury into thinking that petitioners' "intent to comply with the 'safe harbor' regulation" evidenced an intent to defraud the government (*id.* at 8).

This contention is frivolous. The proposed regulation obviously did not *require* petitioners to depreciate the films at 94% of basis over three years. Rather, it *permitted* them to depreciate the films up to 94% of basis—assuming that such an amount of depreciation was otherwise justifiable—without forfeiting certain investment credit benefits. Whether

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[2] The court of appeals also rejected (Pet. App. 8-12, 14-28) a number of other arguments raised by petitioners, none of which they raise here. See Pet. i.

that amount of depreciation was justifiable, of course, depended on whether petitioners had properly applied the income forecast method by using accurate measures of present income and reasonable estimates of future income. The thrust of the government's evidence was that petitioners' estimates were not reasonable at all. Rather, the evidence showed that petitioners greatly overvalued the films, that they falsified the films' actual income, that they made unreasonable estimates of the films' future income, and that they claimed some $2.7 million in depreciation deductions—a figure that conveniently worked out to 93.99% of the films' asserted bases—during a three-year period in which the films grossed less than $10,000. The prosecutor's argument—that this pattern could not have been coincidental and must have been the product of intention and design—was clearly proper.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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[3] Petitioners also suggest (Pet. 8), although they do not present it as a question for review (see Pet. i), that the prosecutor improperly referred to testimony of Murray and unidentified "other people" that the IRS had disallowed the partnership's deductions. This contention was considered and properly rejected (Pet. App. 14-15) by the court of appeals. It found the reference to Murray's testimony proper and the reference to the testimony of "other people" harmless error after "[e]xamining the remark in the context of the entire record" (*ibid.*). These highly factual issues do not merit this Court's review.

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